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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance	)	CC Docket No. 97-213
for Law Enforcement Act	)	

ERRATUM

On February 11, 1997, BellSouth Corporation, on behalf of itself and its affiliated companies, filed a Reply in the above-referenced proceeding. After filing its Reply, BellSouth discovered an inadvertent error in the margin width of the document.

With this filing, BellSouth resubmits its Reply with corrected margin width.

Respectfully submitted,

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DATE: February 12, 1998

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REPLY

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TABLE OF CONTENTS

SUMMARY i

INTRODUCTION 1

I. CALEA MERELY CLARIFIED A CARRIER'S DUTY TO ASSIST LAW ENFORCEMENT IN THE CONDUCT OF ELECTRONIC SURVEILLANCE 2

II. CALEA COVERS RESELLERS AND ALL INFORMATION SERVICES 5

III. THE FBI HAS NOT PROVEN A NEED FOR FURTHER CARRIER REGULATION 7

IV. THE COMMISSION SHOULD ACT ON, AND GRANT, THE PENDING CTIA PETITION 13

CONCLUSION 14

SUMMARY

The record developed through the comments filed in this proceeding demonstrates that current carrier policies and procedures are working, and that CALEA is being implemented as Congress intended. No additional carrier regulation is warranted, especially with respect to requirements designed to assure "evidentiary integrity" as advocated by law enforcement.

Based on their long-standing regulatory treatment as common carriers, resellers of telecommunications services, including unbundled network elements, should be covered under CALEA. The Commission should also clarify that CALEA's information service exemption applies to the information services (including enhanced services) of all carriers, including common carriers who provide telecommunications services. The Commission should not adopt the FBI's proposals with regard to new rules designed to address reporting compromised intercepts or to facilitate the admission of electronic surveillance evidence in judicial proceedings. The Commission should permit all carriers, small and large, to certify their CALEA compliance to the Commission in lieu of filing their policies and procedures.

The Commission should grant the pending CTIA petition, affirm that the recently adopted industry technical standard constitutes a "safe harbor" for purposes of compliance under section 107 of the statute, and, in light of the FBI's continuing failure to publish a final capacity notice, look with favor upon any petition filed pursuant to sections 107 (extension of time to comply with assistance capability requirements) and section 109 (request for Attorney General to pay for compliance costs) of CALEA.

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REPLY

BellSouth Corporation, on behalf of itself and its affiliated companies, by counsel, files its reply to the comments of the Federal Bureau of Investigation and Law Enforcement ("FBI") filed on December 12, 1996, in the above referenced docket.[1]

INTRODUCTION

In the Communications Assistance for Law Enforcement Act ("CALEA"), Congress granted the Commission authority to prescribe only those rules "as are necessary" to implement the requirements of the law.[2] The scope of these implementing rules is limited to requiring common carriers to establish appropriate policies and procedures for supervision and control of its employees so that only authorized interceptions of communications or access to call identifying information occur and that secure and accurate records of any such interceptions or access are maintained.[3] CALEA does not require that the Commission dictate what the policies and procedures contain. Rather, CALEA permits the Commission to prescribe any necessary

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1 *Comments of the Federal Bureau of Investigation Regarding Implementation of the Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213 (December 12, 1997) ("FBI Comments").

2 47 U.S.C. § 229(a).

3 47 U.S.C. § 229(b).

implementation rules to require carriers to have such policies and procedures in place with regard to their assistance obligations under CALEA.

The record in this proceeding, however, demonstrates that the FBI has attempted to utilize CALEA to expand its surveillance authority in direct contravention of the intent of CALEA. Several of the proposed rules noticed by the Commission have been apparently proposed at the behest of the FBI and should be rejected by this Commission. The record developed in this proceeding demonstrates that in terms of carrier cooperation with law enforcement, and the security and accuracy of carrier records, CALEA and the other federal wiretap laws are currently working as Congress envisioned. This Commission should not burden carriers with unnecessary new rules and regulations nor should it require carriers to bear the costs of extra statutory equipment, facilities, services, features, systems or configurations which are advocated by the FBI.

I. CALEA MERELY CLARIFIED A CARRIER'S DUTY TO ASSIST LAW ENFORCEMENT IN THE CONDUCT OF ELECTRONIC SURVEILLANCE

Despite the FBI's cavalier attempt to explain away the legislative history of CALEA in a footnote to its comments, Congress' intent in enacting CALEA is quite clear. The purpose of the legislation is to further define the industry duty to cooperate and to establish procedures based on public accountability and industry standards setting.[4] Because of concerns that law enforcement's ability to conduct electronic surveillance might suffer as telecommunications technology changed, Congress merely placed an affirmative requirement on carriers to modify and design their network equipment, facilities, and services to continue to permit law

[4] H.R. Rep. No. 103-827 at 14 (1994).

enforcement to conduct electronic surveillance. This requirement, however, is subject to certain conditions such as cost reimbursement and the reasonable achievability of the proposed changes to carrier networks. Congress intended for CALEA to preserve the status quo and granted the FBI and law enforcement no additional electronic surveillance powers.[5] Further, Congress intended that the telecommunications industry, law enforcement, and the FCC narrowly interpret the requirements of CALEA.[6] The FBI has completely mischaracterized the intent and plain meaning of CALEA because Congress neither intended for CALEA to be "comprehensive" nor did it speak to law enforcement's "related statutory search authority."[7] The FBI's attempts to enhance their "evidentiary integrity" processes through the adoption of rules by this Commission should be dismissed.[8]

As stated above, CALEA changed federal wiretap law very little with regard to a carrier's obligation to assist law enforcement in the performance of electronic surveillance. CALEA and other federal wiretap laws require carriers to provide the same assistance to law enforcement when presented with a valid court order or other authorization: call content in the case of a Title III order and call identifying (dialing) information when presented with an order for a pen register or trap and trace device. Today, carriers typically identify an access point within their facilities where law enforcement may conduct their electronic surveillance and also may provide

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5 H.R. Rep. No. 103-827 at 22 (1994).

6 H.R. Rep. No. 103-827 at 23 (1994).

7 FBI Comments at 9-10.

8 The FBI states that law enforcement's primary electronic surveillance concerns have not changed despite the dramatic change in the telecommunications markets: (1) timeliness, (2) security, (3) accuracy, and (4) evidentiary integrity. FBI Comments at 4. The Commission has not been given authorization to promulgate rules regarding the evidentiary integrity of carrier records, or to promulgate any other rules that are not necessary. 47 U.S.C. §§ 229(a), (b).

an access facility to the law enforcement "listening post." As a result of technological changes under CALEA, carriers may be required to provide call content and call identifying information directly from their switches once the technical capability has been developed. As the Commission recognized in its NPRM, CALEA prohibits law enforcement agencies from remotely activating interceptions within a carrier's switching premises.[9] Congress did not intend, therefore, for carriers to be "partners" with law enforcement in the conduct of electronic surveillance.

Congress was necessarily concerned about customer privacy issues and required a clear delineation between law enforcement's conduct of electronic surveillance and a carrier's assistance with regard to that electronic surveillance. Thus, Section 105 of CALEA was included to address concerns for the systems security and integrity of carrier facilities and operations to the extent a carrier assists law enforcement. The Commission's focus in its rulemaking capacity should be narrowly exercised only to ensure such carrier system security and integrity and not to require carriers to engage in evidence gathering and "packaging" of evidence for law enforcement to produce at trial. Under CALEA, despite its requirement for carriers to modify their networks under certain circumstances, a carrier nonetheless continues to provide only call content and call identifying information to law enforcement pursuant to a valid court order or other appropriate authorization. The Commission must keep its narrow statutory mandate in mind when it prescribes rules that will cover thousands of carriers in the industry.

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[9] Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, Notice of Proposed Rulemaking (October 10, 1997) ("NPRM") at ¶ 7.

II. CALEA COVERS RESELLERS AND ALL INFORMATION SERVICES

BellSouth agrees with much of the FBI's analysis of CALEA's coverage, and specifically with respect to its contention that resellers must be accountable to assist law enforcement in any way technically feasible under CALEA.[10] The Commission should reject Motorola's assertion to the contrary.[11] Contrary to Motorola's assertions, resellers do qualify as telecommunications carriers under CALEA and they do engage in the transmission of communications. As PCIA notes, ever since the *Resale and Shared Use Order*, *NARUC I* and *NARUC II*, resellers have already made the necessary adjustments to their business plans to function as regulated entities.[12]

In the *Resale and Shared Use Order*, this Commission found that an entity engaged in the resale of a communications service is a common carrier:

> . . .[W]ith the exception that some resellers may not own any transmission plant, we perceive no difference between resale and traditional communications common carriage. The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities--rather than owning them--ought not have any regulatory significance. The public neither cares nor inquires whether the offeror owns or leases the facilities . . .The ultimate test is the nature of the offering to the public. No one contends that resellers will make a private offer of communications service rather than a public offering . . . Accordingly, the offering which resellers will make will satisfy the "*sine qua non*" of common carrier status, and they will be considered as such.[13]

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[10] FBI Comments at 13; Ameritech Comments at 2; GTE Comments at 4-5; Omnipoint Comments at 6-7; PCIA Comments at 6-8; SBC Comments at 6-7; USTA Comments at 3-5.

[11] Motorola Comments at 5.

[12] PCIA Comments at 7-8.

[13] *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 308 (1976) (footnotes omitted). The Commission defined resale to be an activity wherein one entity subscribes to the communications services and facilities of another entity and then reoffers communications services and facilities to the public (with or without "adding value") for profit. *Id.* at 271.

Although Motorola argues that CALEA's legislative history suggests that Congress did not intend for the definition of "telecommunications carrier" to be interpreted expansively, it is clear from the legislative history, quoted by Motorola, that the definition encompasses the types of common carriers enumerated therein as well as "any other common carrier that offers wireline or wireless service for hire to the public."[14] As U S WEST correctly points out, the CALEA definition requires that, to be considered a "telecommunications carrier" at all, an entity must be a "common carrier."[15] Resellers have long been treated by the Commission as common carriers.[16] Thus, affirming that resellers of telecommunications services, including unbundled network elements, are included within CALEA's definition of "telecommunications carrier" is not so much a matter of expanding the CALEA "list of entities" identified in the legislative history, as it is expressly recognizing fundamental, long-established regulatory policy concerning the common carrier status of resellers.

The FBI urges the Commission to "consider a conservative definition of information services because of the possible criminal uses of such services."[17] As US WEST correctly points out, however, the term "information services" as used in CALEA clearly encompasses all services that are "information services" for purposes of the 1996 Act including, necessarily, all

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14 Motorola Comments at 2, n.3, quoting H. R. Rep. No. 103-827 at 20 (1994). Although PageNet agrees that resellers and other like carriers should have specific CALEA compliance obligations, PageNet erroneously suggests that "resellers were excluded from the list of carriers that would be subject to CALEA requirements." PageNet Comments at 6. As shown above, resellers are common carriers and all common carriers are expressly included in the "list."

15 U S WEST Comments at 7, n.8. *Accord* TIA Comments at 2 (Congress intended CALEA to cover communications common carriers).

16 PCIA Comments at 7-8; *Resale and Shared Use Order*, 60 FCC 2d at 308.

17 FBI Comments at 15.

services that previously fell within the Commission's definition of "enhanced services."[18] While the FBI appears to concede that information services provided by common carriers are not subject to CALEA,[19] the record in this proceeding suggests that the Commission would do well to clarify that the CALEA information services exemption is not limited by its terms to those entities that "exclusively" provide such services, but extends to the information services of carriers who provide both telecommunications and information services.[20]

III. THE FBI HAS NOT PROVEN A NEED FOR FURTHER CARRIER REGULATION

In advocating the need for extensive federal regulation to address timeliness, accuracy, security and "evidentiary integrity" in carrier intercept activities, the FBI states that there have been anecdotal reports of instances where carriers have refused to provide assistance to law enforcement even after being presented with a facially valid court order in circumstances where carrier personnel "did not recognize" a particular judge's signature or where the description of the carrier service to be included in the intercept did not precisely match the carrier's brand name for that service.[21] Beyond this isolated and unsubstantiated statement, drafted in the passive voice, based on anecdotal reports rather than substantial, credible evidence, the FBI offers no facts to show that current carrier policies and procedures to implement CALEA are not working.

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18 U S WEST Comments at 6, 9-13.

19 FBI Comments at 14-15.

20 AT&T Comments at 39-41; Ameritech Comments at 2-3; CTIA Comments at 24-25; CDT Comments at 21-22; Metricom Comments at 5; NTCA Comments at 2; SBC Comments at 8-9; U S WEST Comments at 6-12; USTA Comments at 5.

21 FBI Comments at 16 (quotation marks in original without source attribution). Such anecdotal reports are so inconclusive as to also be consistent with a carrier's good faith efforts to only allow properly authorized interceptions of private communications.

Indeed, the record overwhelmingly demonstrates that carriers are cooperating with law enforcement in their attempts to engage in lawfully authorized electronic surveillance of criminal suspects. AT&T states that it has a long history of cooperating with law enforcement in fighting crime, and that its wireless subsidiary trained 15,000 law enforcement officers in 1997 to recognize and combat cellular cloning.[22] Specifically, AT&T's expertise was solicited by law enforcement in at least three high profile criminal cases identified by suspect name or law enforcement jurisdiction.[23] AT&T reports that in a recent one year period its wireless subsidiary handled 447 Title III wiretaps and 868 pen register or trap and trace orders without a single breach of security or integrity.[24]

The record is encouraging with respect to other wireless carriers. Bell Atlantic Mobile states that it has supplied ongoing assistance to law enforcement personnel, that many BAM employees regularly work with federal, state and local law enforcement agencies, that the company continues to spend considerable resources to help those agencies, and that the company is "fully committed to fulfilling all of its new obligations under CALEA."[25] CTIA and its members "always have cooperated with law enforcement in the conduct of electronic surveillance and in many other law enforcement initiatives."[26] Paging carriers routinely cooperate with law enforcement officials by providing them with specific pager codes and with

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22 AT&T Comments at 1.

23 *Id. at n.2.*

24 *Id.* at 2.

25 BAM Comments at 1-2. Similarly, Airtouch Communications is "committed to continue supporting fully the legitimate needs of law enforcement." Airtouch Comments at 1.

26 CTIA Comments at 3.

corresponding coded clone pagers that allow law enforcement to surreptitiously receive whatever messages the target of the surveillance warrant receives.[27] Other carriers, including relatively new entrants, report gaining substantial experience in the area of working cooperatively with law enforcement authorities, and have assisted law enforcement officials to conduct lawful electronic surveillance in numerous situations.[28]

The record likewise does not indicate the need for additional regulation of wireline carriers. SBC states that it and its subsidiaries have a long and active history of cooperating with and assisting law enforcement in conducting court-approved electronic surveillance, and currently no problems exist in carrying out this service in a timely, accurate and efficient manner.[29] U S WEST reports that as a matter of historical practice many carriers have cooperatively participated with law enforcement and that the company would be surprised if, during that time, there have been *any* material breaches of individuals' expectations of confidentiality or violations of statutory mandates and obligations by those carriers with respect to law enforcement interceptions.[30] More specifically, U S WEST reports that in over 25 years of its own internal Court Order Processing Center operations there has never been an unlawful interception nor has the confidentiality of a lawful interception ever been compromised.[31] USTA

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27 PCIA Comments at 8-9.

28 Omnipoint Comments at 1. *See also* PageNet Comments at 1 (each year PageNet responds to numerous law enforcement requests and has substantial experience in assisting law enforcement).

29 SBC Comments at 3. SBC goes on to state that it believes this to be generally true throughout the industry.

30 U S WEST Comments at 14.

31 *Id.* at 16.

states generally, and correctly, that "telephone companies have in the past and will continue in the future to provide assistance to law enforcement."[32] The foregoing comments reveal a diversity of internal policies and procedures that are in place and working.[33] The Commission should therefore reconsider its proposed rules to the extent they impose unnecessary new burdens and obligations on carriers.[34]

Specifically, the Commission should not adopt the FBI's suggestion that the Commission should require that no more than 2 hours be allowed to elapse between the discovery that an intercept has been compromised, or is suspected of being compromised, and the report of that fact to the affected law enforcement agency or agencies.[35] The FBI has provided no evidence that such a time limit needs to be imposed, or any further justification for the time limit. Nor should the Commission attempt to establish a one-size-fits-all standard determining what preventative measures would reasonably be required to ensure that compromised intercepts do not go undiscovered or unreported.[36] Existing carriers policies and procedures, in conjunction with existing regulatory and statutory proscriptions, provide adequate incentive to ensure that

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32 USTA Comments at 3. In each of the last three years, BellSouth Telecommunications, Inc. has handled over 1,250 wiretap court orders and to its knowledge there have been no problems of the kind described by the FBI in its comments.

33 *See, generally*, AT&T Comments, esp. n. 55; Powertel Comments at 4, SBC Comments *passim*; US WEST Comments at 16-18.

34 360 Communications Company Comments at 3 (several proposals are impractical, burdensome and unnecessary); AT&T Comments at 28 (proposed rules are more complex and burdensome than necessary to meet the Commission's obligations); Airtouch Comments at 3 (pervasive recordkeeping rules are unnecessary).

35 FBI Comments at 21.

36 *Id.*

only lawfully authorized intercepts occur.[37] Indeed, one large carrier covering a vast geographic region reports that in nearly three decades of surveillance assistance there has not been a single compromised surveillance.[38]

BellSouth agrees with the FBI that the statute does not distinguish between large and small carriers.[39] BellSouth is opposed to the Commission's proposal that only small carriers be allowed to certify their CALEA compliance. Instead, BellSouth agrees with those parties who state that the Commission should allow all carriers to certify their compliance.[40] The Commission could then review such certificates as it deems necessary and judge their adequacy in light of each carrier' particular circumstances. Finally, for the reasons set forth in its Comments, BellSouth opposes the FBI's proposal that reports of compromised intercepts be made to the FCC. Ameritech correctly notes that such a requirement would not provide any additional protection, but would add additional risks of exposure of the violated party in the case of intercepts, particularly unlawful ones.[41]

BellSouth strongly objects to the FBI's rationale for advocating the establishment of unnecessary record-keeping procedures:

> Carriers must maintain records of all personnel who are involved in the installation and maintenance of intercepts. The reasons for maintaining such information include the fact the carrier personnel having any part in the installation of an intercept may be required to testify in a criminal prosecution as

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37 Airtouch Comments at 19; PCIA Comments at 11.

38 US WEST Comments at 16.

39 FBI Comments at 32.

40 SBC Comments at 8; GTE Comments at 10-11; PCIA Comments at 10-11.

41 Ameritech Comments at 5. Ameritech correctly raises a serious legal objection to the Commission's proposed requirement that assistance be given to anyone other than the person authorized to receive the intercepted information. Ameritech Comments at n.4.

> to how the intercept was installed and maintained. Without a clear "chain of custody" for the intercept, prosecutions might fail if law enforcement were unable to demonstrate Title III compliance.[42]

This language betrays a fundamental misunderstanding on the part of the FBI on the scope and coverage of CALEA. Congress did not pass the statute to ensure evidentiary chain of custody compliance. As noted above, the Act requires expeditious, secure and accurate assistance on the part of telecommunications carriers, but such assistance does not extend to "evidentiary integrity," as the FBI puts it.[43] As Ameritech correctly states in the context of its opposition to the Commission's proposed ten-year document retention rule:

> Law enforcement's requirement is related to the judicial proceedings which would use or rely on such evidence. CALEA was designed to expedite intercepts. It is not designed for the FCC or law enforcement to establish any rule beneficial to them regarding the recordkeeping of intercept information. Thus, there is nothing in the CALEA legislation which provides a justification for imposing the cost and expense of this recordkeeping requirement on telecommunications carriers.[44]

The same rationale applies in the context of the FBI's efforts to establish procedures that attempt to ensure an evidentiary chain of custody. BellSouth specifically opposes the FBI's comments in support of a requirement that carriers be required to maintain a list of designated personnel working on intercept issues, or of third parties with access to carrier switching facilities.[45] In any event, the admissibility of any such evidence can only be determined by the rules that apply in

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42 FBI Comments at 25.

43 *Id.* at 4.

44 Ameritech Comments at 6, n.5. As stated in its comments, and in its separate Initial Regulatory Flexibility Act comments, BellSouth is also opposed to the proposed ten-year document retention period.

45 FBI Comments at 25. The record is clear that such a requirement is unnecessary. *See* SBC Comments at 19-20; USTA Comments at 7; US West Comments at 23-25; AT&T Comments at 32.

the particular local, state or federal court in which any such evidence is introduced; the Commission's establishment of additional rules to ensure an evidentiary chain of custody will not ensure that a court will in fact, in particular circumstances, rule that such evidence is admissible. Even if it could be shown that any particular carriers' internal policies and procedures impair the admissibility of electronic intercepts, the FCC has no statutory authority under CALEA to ensure the evidentiary integrity of government wiretaps.[46] The collection, production and subsequent use of evidence in criminal prosecutions are exclusively the province of law enforcement.

IV. THE COMMISSION SHOULD ACT ON, AND GRANT, THE PENDING CTIA PETITION

In the two months since the Commission issued its notice of proposed rulemaking in this docket, the CALEA assistance capability compliance implementation deadline of October 25, 1998, has not changed. Nothing else has changed. The FBI has not yet issued its final capacity notice. Law enforcement agencies are threatening to displace the FCC in the area of its technical expertise and usurp the Commission's ability to declare the safe harbor interim standard as the current appropriate industry standard for CALEA implementation.[47] The comments in this proceeding overwhelmingly support an extension of the Section 103 compliance date.[48] Given

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[46] 47 U.S.C. § 229. BellSouth Telecommunications, Inc., personnel have not been required to testify concerning a court-ordered electronic surveillance at any time within the last three years.

[47] Letter from Stephen R. Colgate, Assistant Attorney General for Administration, to Geoffrey Feiss, Director, State Relations, USTA (February 3, 1998).

[48] 360° Communications Comments at 7-8; AMTA Comments at 8; AT&T Comments at 25; BAM Comments at 8-9; CTIA Comments at 6-8; GTE Comments at 14; Motorola Comments at 11; Nextel Comments at 15-16; OPASTCO Comments at 3-9; PCIA Comments at 3-4; PageNet Comments at 13-15; PrimeCo Personal Communications Comments at 5-6; RTG

the need for certainty and an efficient and cost-effective implementation of CALEA, BellSouth encourages the Commission to act immediately upon CTIA's petition, granting the extension requested therein and confirming the industry adopted standard. Although the Commission stated that "it is not clear whether requests for extension of time of the Section 103 compliance date will be forthcoming,"[49] the record is clear that the Commission can expect a flood of extension petitions as the compliance date nears, but a CALEA compliant solution is not yet available.[50] As AT&T stated:

> This flood of petitions can be avoided if the Commission acknowledges that the lack of a standard means that commercially available technology does not exist and therefore a blanket extension is required.[51]

In the meantime, in light of the foregoing, especially the lack of a final capacity notice, and for the reasons set forth in BellSouth's earlier filed comments, the Commission should look favorably upon any section 109 and 107 petitions filed by carriers.

CONCLUSION

The record overwhelmingly supports the conclusion that portions of the Commission's proposed rules implementing CALEA are unnecessary in light of current carrier practices and the lack of any credible evidence that these practices have resulted in material non-compliance with CALEA's essential goal of expediting accurate and secure intercepts. In light of current

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Comments at 6-7; TIA Comments at 9-11; USCC Comments at 2-3; USTA Comments at 13-14; US West Comments at 47-48.

49 *Id. But see*, CTIA Petition, n. 14, *supra.*

50 AT&T Comments at 25.

51 *Id.*

circumstances, the Commission should devote its attention to the pending CTIA Petition, granting the relief sought therein and affirming the current industry standard as a safe harbor.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 11th day of February, 1998, served all parties to this action with a copy of the foregoing **REPLY** by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed on the attached distribution list.

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